LOS ANGELES BAR BULLETIN

In This Issue

VOL. 19 MAY, 1944 NO. 9

LOS ANGELES

BAR BULLETIN

Official Monthly Publication of Los Angeles Bar Association. Entered as second-class matter October 15, 1943, at the Postoffice at Los Angeles, California, under Act of March 3, 1879. Subscription Price $1.00 a Year; 10c a Copy

VOL. 19 MAY, 1944 No. 9

BULLETIN BUSINESS OFFICE
241 EAST FOURTH STREET
TRinity 5206

BULLETIN EDITORIAL OFFICE
1124 Rowan Building
TUcker 8118

AN EDITOR CHALLENGES US

THREE generations ago, the railroads and the forces that accompanied them began changing our country from a rural, agricultural way of living into a predominantly industrial society. New problems brought demands for speedier and more detailed methods of ordering conduct. Court procedure of the time was not adapted to answer the call for positive regulation, so we borrowed from Continental Europe the administrative agency.

At first the Continental method of positive regulation was applied in America to the control of large public utilities. Later it was extended to various professions and callings, and more recently in one way or another to almost every phase of agricultural, industrial, business and professional life. History points to the beginning of this trend in the '80's. It is the device of no particular political party.

In California, the growth of the administrative agency has kept pace with increased use of this vehicle in other states and in our Federal Government. Each new problem has given rise to demand for regulation, which in turn has provided the excuse to create a new administrative agency. Today, in this state, such

agencies regulate everything from railroads to yacht-brokers, from barbers and manicurists to "structural pest" experts.

Because our courts have all too often resisted attempts to improve methods of judicial administration, and because the judicial process is at best necessarily slow, the legislative branch of government has followed the easy alternative of placing judicial power in the hands of administrative agencies of the executive branch. The result is what we know today as "administrative" justice—the end product of judicial power wielded largely by laymen, at a pace characteristic of modern-day methods of executive administration.

By way of illustration, The State Bar Committee on Administrative Agencies and Tribunals has reported:

> "In actual practice the hearing [in a proceeding to revoke a contractor's means of livelihood, his license] is conducted by deputy registrars, who are under civil service, but not legally trained. . . . Several of the deputy registrars are now studying law to better qualify themselves for the discharge of the judicial function imposed upon them by the necessity of hearing disciplinary matters." 18 State Bar Journal, 430 (Dec. 1943).

Recently the State Bar, in an effort to sponsor some practical means of improving such administrative justice, has suggested the appointment of a "hearing officer" to conduct trials of those charged with violating the rules of an administrative agency. The proposed hearing officer would be "one competently trained to conduct the hearing." Which of course is but another way of saying that he should be a person trained, like our judges, in the history, traditions and technique of our common-law system of justice.

Commenting editorially, the Los Angeles Evening Herald and Express (April 11, 1944), expresses the view that the State Bar proposal "would in fact increase bureaucracy in California—in short, set up an entirely new group of bureaucrats."

The editor displays a clear appreciation of the evil which the State Bar proposal seeks to meliorate, but observes "The courts . . . traditionally have been the refuge of the people. In court, the accused can place his fate in the hands of a judge . . . or in the hands of a jury of his peers."

The editorial concludes: "The State Bar is in the right church, but in the wrong pew."

If the choice can now be made, it seems certain that the overwhelming majority of members of the State Bar would not approve the deposit of judicial power with any agency other than the court. They would agree wholeheartedly that "the courts traditionally have been the refuge of the people"—and should continue to be.

State Bar sponsorship of the "hearing officer" proposal indicates that the legal profession views as politically impracticable an attempt at this late date to restore to our courts the judicial powers so long exercised by the various administrative agencies.

The editor's statement—that "the State Bar is in the right church, but in the wrong pew"—suggests the probability that the lawyers of California may be too pessimistic; that the legal profession may well be underestimating lay interest in and understanding of the problem. It suggests also the hopeful possibility that, with the aid of an interested and informed press, we might find it entirely practicable to undertake a campaign to restore judicial powers to our courts, rather than merely attempt makeshift improvements such as the "hearing officer" proposal envisions.

Two major changes would be necessary in order to accomplish such restoration. First, it would be essential to modernize present methods of judicial administration and to reorganize and departmentalize our courts so as to equip them to handle the controversies now adjudicated by administrative agencies; and second, to convince the people of the desirability of restoring to the courts the judicial powers now vested in the executive branch by legislative fiat.

Might it not be much simpler—and infinitely more desirable—to explain to the people why judicial functions should be removed from agencies of the executive branch and restored to the courts, in keeping with our historical concept of proper division of governmental powers, rather than try to convince them that "hearing officers" (judges) should be installed to preside over the "tribunals" (courts) now conducted in the executive branch?

From the standpoint of public expense, it would, or at least should, require just as many judges properly to adjudicate controversies in an "administrative" court as in a "judicial" court. —W. C. M.

A WORD FROM THE PRESIDENT

I SHOULD LIKE to address a personal word to the comparatively few members of the Association who have not yet paid their current dues. I realize that it is entirely due to oversight. The office is greatly burdened by personal correspondence and clerical work. It would be a great help if those of you who have not yet paid your 1944 dues would send in your check forthwith without necessitating further office action.

It will be recalled that last November the by-laws of the Association were amended to provide for the issuance of sustaining memberships on a dues basis of $25 per year. I am delighted to report that already 214 sustaining memberships have been voluntarily applied for and issued. There is a very practical necessity for a larger number of sustaining memberships. To date 316 of our members are in the armed services with dues remitted for the duration. Those who have not paid current dues may apply for a sustaining membership by forwarding the sum of $25. Those who have already paid may pay an additional $13 and become sustaining members. Such dues are proper deductions for income tax purposes. I want to thank you in advance for your unfailing co-operation in this matter.

In the presence of so many vital problems with far-reaching implications both abroad and at home it is increasingly important for the bar of America to become better organized. With greater frequency events of the day require some effective means to make the voice of the bar articulate. The many problems of the profession can not be solved except by and through organized effort. The public service which lawyers are requested to render almost daily can be rendered only through a strong local bar association. The response which members of the bar of Los Angeles County, including members of the affiliated associations, have given to the call for service in the many activities of the Los Angeles Bar Association is mighty reassuring. I should like to suggest to those members who are specially interested in any field of associational activity to advise me that committee appointments may be made in accordance with such special interest.

Harry J McClean

BY THE BOARD

Federal Rules of Criminal Procedure: President McClean has appointed, and the board has approved, a special committee to study the second preliminary draft of the Federal Rules of Criminal Procedure for the purpose of making suggestions relative thereto. This action was in response to a request from Judge Peirson M. Hall, United States District Court. The committee is composed of the following: Mark L. Herron, chairman; David H. Cannon, Fred Horowitz, Maurice Norcop, J. E. Simpson, and J. Marion Wright.

* * *

Unlawful Practice: The board approved the president's appointment of Julius V. Patrosso to be chairman of the Committee on Unlawful Practice of the Law for 1944-1945.

* * *

Attorneys Discharged From Military Service: J. Harold Decker was appointed to the chairmanship of the committee to assist attorneys discharged from military service.

* * *

War Council: President McClean was authorized to appoint a special committe whose duties will be to carry out the program as defined by the State Bar, at the request of the California War Council. The principal function of the Association's committee will be to provide means of advising persons about to be inducted into military service of steps they should take to put their business and personal affairs in order, such as the preparation of a simple will, power of attorney, *et cetera.*

The president appointed the following members of the committee:

George K. Whitworth, Chairman	Hon. W. Turney Fox	Alfred P. Peracca
Jack E. Addington	Gene E. Groff	Laurence A. Peters
Robert Brennan	Stephen J. Grogan	L. H. Phillips
Fairfax Cosby	Percy V. Hammon	Charles A. Son
Norman R. Dowds	Frank L. Holt	Joseph D. Taylor
George F. Elmendorf	Frank J. Keeney	Hon. Frank G. Tyrrell
Irving Feintech	Harold W. Kennedy	William W. Waters
	Rollin L. McNitt	Wyckoff Westover

—E. D. M.

JUNIOR BARRISTERS

STANDING in direct contrast to the multitude of inflationary trends is the membership of Junior Barristers. The method of actual count has given way to a formula well tested by experience, to wit: "The decrease in membership is in direct proportion to the call of the Draft Boards." To date, this formula has accurately accounted for over one-half the total number of members.

In spite of this acute manpower shortage, those still in practice have determined that their organization will not be laid at rest for the duration. To the contrary, its activities are becoming more pronounced. The luncheon which featured the three candidates for the office of District Attorney was attended by two tables of Junior Barristers. A representative number likewise heard those seeking the senatorial nominations.

Three weeks ago, at a meeting of the Executive Council, a regular monthly luncheon plan was adopted and, to date, the arrangements for the first of its kind have been made. By this plan it is our purpose to further the association of those who remain and to place in the hands of those who return a working organization.

Appearing as guest speaker at the first luncheon, May 25th, at the Los Angeles Athletic Club, will be Jerry Giesler, member of the Association and a nationally known attorney. Arrangements have been made by William Brainherd to contact by telephone the individual members. There will likewise be a notice by mail.—W. S.

WITH THE SECTIONS

INTEREST in the activities of the various sections of the association continues to run high, and the importance of the work being done is becoming impressive.

One of the most interesting meetings was held on Wednesday evening, June 17th, at the University Club, attended by a capacity membership of the Insurance Law Section, of which Joe Crider, Jr. is Chairman, Henry Duque, Vice-Chairman, and Grant B. Cooper, Secy.-Treasurer. This meeting had a two-fold purpose: first, to afford an opportunity to each member present to relax and relate some unusual phase of insurance law experience in a lawsuit; and second, to further a fraternal spirit in the section through the medium of a fine dinner preceded by cocktails. This meeting was voted an outstanding success in attaining its objectives.

The Probate, Real Property and Trusts Section held its meeting on May 15th at the usual hour and place, and discussed the law of administration of estates of missing persons. Lawrence L. Otis, Chairman of the section, did a commendable piece of work in leading the discussion on this subject.

The Section on Corporation, Banking and Mercantile Law, under the chairmanship of Ross C. Fisher, continues in high gear. Its meeting on May 8th was well attended to hear the concluding lecture on conditional sales contracts, chattel mortgages and trust receipts, given by A. J. Getz of the Los Angeles Bar.

The Municipal Law Section met on May 1st, under the chairmanship of Mark Hall, Assistant City Attorney, to discuss the 1931 Claim Statutes (Stats. 1931, page 2475; Act 5149, Deering's General Laws). Louis Babior, Deputy City Attorney, canvassed the subject with a talk entitled "Never Let Your Claim to Fame Rest on a Defective Claim."

Jerry Giesler, Chairman of the Criminal Law Section, introduced a past president of the Los Angeles Bar Association, W. H. Anderson, as the principal speaker at the last meeting of the section which was held on May 22nd. He spoke on the subject of cross-examination. This discussion was amply illustrated by recitals of actual experiences and was highly interesting.

The Section on Taxation held its first meeting of the current year on the afternoon of May 22nd at the Hall of Records and

was very well attended. David Tannenbaum, chairman of the section, arranged an elaborate program which embraced a discussion of the new federal tax amendments by John O. Palstine, Stanley Morrison, William L. Kumler, and David Tannenbaum. Many of the members of this section participated in the Practicing Law Institute tax course, recently concluded.

The Section on Torts, Persons and Domestic Relations, of which Roland L. McNitt is Chairman, was scheduled to hold its meeting late in May, and at the time THE BULLETIN went to press the program for this meeting was in preparation.

Members of the Association again are urged to lend their active support in the work of the various sections by participating in its programs, with the expectancy of developing vital information and making a study of the new trends in the various fields of law. Notice of section meetings appear in the Los Angeles Daily Journal.—S. M.

STATE BAR CONFERENCE

WHETHER there will be a State Bar convention this year will, it is understood, be determined by the Board of Governors at its meeting during the last week in May. A meeting of the conference of delegates will depend upon the action of the governors with reference to the annual convention. It is presumed that there will be conference meetings in the North and in the South, following the precedent established in 1943. The first meeting of the Los Angeles Bar Association delegates to the 1944 conference was held on May 17.

Judge Ralph E. Jenney, United States District Court, has been chosen president of the Los Angeles Community Welfare Association for the current year. The organization operates the Community Chest and the Council of Social Welfare Agencies.

DELEGATES TO STATE BAR CONFERENCE

THE President of the Association has appointed, and the Board of Trustees has approved, the Delegates and Alternates to the 1944 State Bar Convention to represent the Los Angeles Bar Association.

While it is not yet known whether the State Bar governors will decide to hold sectional meetings of the conference, one in the north and one in the south, it is assumed that there will be some sort of conference provided for.

The following delegates and alternates were chosen:

DELEGATES

Kimpton Ellis, Chairman
Betty Marshall Graydon
Secretary
Florence M. Bischoff
Rush M. Blodget
Robert Brennan
Ella Rae Briggs
F. Walton Brown
Herbert Cameron
Zach Lamar Cobb
Wilbur D. Finch
Mark L. Herron
Wm. B. Himrod
Herbert A. Huebner
Glen E. Huntzberger
Ralph G. Lindstrom
W. Joseph McFarland
James H. Mitchell
Ewell D. Moore
Lawrence L. Otis
John O. Palstine
Wm. M. Rains
James B. Salem
Wixon Stevens
Roane Thorpe

ALTERNATES

(Alternates will be appointed delegates, in the order named, to take the places of delegates who are unable to serve.)

William C. Bartlett
Charles E. Beardsley
Harold A. Black
H. Eugene Breitenbach
Bernard Brennan
Loren A. Butts
Grant B. Cooper
J. Wesley Cupp
Leonard A. Diether
Sloan Flack
Harold H. Krowech
Lawrence L. Larrabee
C. LaV. Larzelere
John C. Morrow
William H. Neal
James E. Neville
John Henry Nutt
Alford P. Olmstead
Paul J. Otto
Albert D. Pearce
Donald R. Peck
George W. Prince, Jr.
Percilla L. Randolph
David R. Rubin
Clarence B. Runkle
Maurice Saeta
O. C. Sattinger
Clyde C. Shoemaker
Austin C. Sherman
Joseph Smith
John C. Stick
Leslie R. Tarr
Paul R. Watkins
H. L. Watt
Pierce Works

JUVENILE CRIME PROBLEM

THE Board of Trustees of the Los Angeles Bar Association, at the request of the Association's Juvenile Crime Prevention Committee, has adopted a resolution urging that an investigation be conducted by the county's Chief Administrative Officer in order to advise the Board of Supervisors of the needs of the juvenile department of the Probation Office for additional personnel, increased salaries, and increased facilities for handling juvenile delinquents.

The resolution is as follows:

BE IT RESOLVED by the Board of Trustees of the Los Angeles Bar Association, on this 28th day of April, 1944, that the President be and he is hereby authorized and directed to convey the following to the members of the Board of Supervisors of Los Angeles County:

That as a result of an investigation of the Juvenile Court, Probation Department and Probation Committee, all of the County of Los Angeles, by the Juvenile Crime Prevention Committee of the Los Angeles Bar Association, it is deemed not only advisable but imperative that before the County budget is

accepted for the next fiscal year by the Board of Supervisors an investigation be conducted by the Chief Administrative Officer of the County into

(a) The number of probation officers engaged in juvenile probation matters;
(b) The case load of each such probation officer;
(c) Whether the present number of juvenile probation officers do or can give that degree of supervision to juveniles on probation which will be most effective in the rehabilitation of the juvenile delinquent;
(d) Whether the pay scale for juvenile probation officers is commensurate with the qualifications required of and responsibilities carried by such juvenile probation officers;
(e) The adequacy of present facilities for detention of juvenile delinquents;

all to the end that the Chief Administrative Officer may be in a position to advise the Board of Supervisors as to

(1) The need of the Probation Office, Juvenile Department, for increased personnel, and
(2) Increased salaries for Juvenile Probation Officers, and
(3) The need for increased facilities for detention of juvenile delinquents.

That a copy of the findings of the Chief Administrative Officer be placed, immediately upon completion, in the hands of the Juvenile Crime Prevention Committee, of the Los Angeles Bar Association, to the end that said Committee may consider and comment on said findings to the Board of Supervisors before the same is acted upon by said Board.

CONSTITUTIONAL PRINCIPLES FOR WORLD ORDER

PURSUANT to a resolution adopted by the Board of Trustees of the Association, President McClean has appointed a special committee to consider problems involved in the creation of a post-war international organization designed to enforce law and order, within the spirit of resolutions adopted by the American Bar Association.

This subject has had the consistent attention of the American Bar Association House of Delegates since August, 1942, when its first resolution affirmed "its devotion to and its faith in the existence, permanency and validity of international law and the law of nations as the fundamental basis for regulating international relations."

In March, 1943, the House of Delegates endorsed, "as one of the

primary war and peace objectives of the United Nations, agreement among such nations for the complete establishment and maintenance at the earliest possible moment of an effective international order among all nations based on law and the orderly administration of justice."

The next step taken by the American Bar Association was in September, 1943, when it expressed itself in a resolution of the Delegates as "favoring the creation of appropriate international machinery with power adequate to establish and to maintain a just and lasting peace among the nations of the world," and as "favoring participation by the United States therein through its constitutional processes." In February, 1944, the House of Delegates in a resolution called attention to its previous action taken, and to the resolution of the United States Senate, providing: "That the United States, acting through its constitutional processes, join with free and sovereign nations in establishment and maintenance of international authority with power to prevent aggression and to preserve the peace of the world. . . ."

The American Bar Association then reaffirmed its adherence to the principles set forth in its several resolutions, and urged all members of the American Bar Association "to avail themselves of every opportunity to cooperate with the legislative and executive branches of our government in measures for the prompt and effective implementation of these resolutions."

This is the background against which the Los Angeles Bar Association's trustees took action in the following resolution:

> "Resolved that the Board of Trustees of Los Angeles Bar Association approves the resolutions on Constitutional Principles for World Order adopted by the Senate and House of Representatives of the Congress of the United States and affirmed by the House of Delegates of the American Bar Association on the 29th day of February, 1944, and
>
> "Be It Further Resolved that the President of the Los Angeles Bar Association shall be and is hereby authorized to appoint a special committee of the Association to consider problems involved in the creation of a post-war international organization designed and authorized to enforce law and order within the spirit of resolutions heretofore adopted by the American Bar Association relating thereto and to report its findings and resolutions to the Board of Trustees at the earliest convenient time."

President McClean promptly appointed the special committee

on Postwar Organization to Enforce Peace Through Law, composed of the following:

J. C. Macfarland, Chairman
Jerry Geisler, Vice-Chairman
Warren E. Libby, Vice-Chairman
James L. Beebe
Henry G. Bodkin
Hon. Fletcher Bowron
Prof. Chas. E. Carpenter
Zach Lamar Cobb
T. B. Cosgrove
Alex W. Davis, Board Member
Isidore Dockweiler
Frank F. Doherty
Dean Wm. G. Hale
Byron C. Hanna
S. T. Hankey
Wm. B. Himrod
Fred A. Knight
Hon. May D. Lahey
Albert W. Lane
Oscar Lawler
Ralph G. Lindstrom
Albert H. Miller
Hon. Wm. J. Palmer
Mrs. Edna Covert Plummer
Preston D. Richards
Milan E Ryan
Paul E. Schwab
Joseph Scott
Norman S. Sterry
Marshall Stimson
Hubert W. Swender
Hon. Frank G. Tyrrell
Chas. T. Woodbury
Edward R. Young

—E. D. M.

LET'S STOP APOLOGIZING FOR OUR COURTS

By Landon Morris, of the Los Angeles Bar

WITH increasing frequency our bar publications are filled with articles deprecating and criticizing our courts. Comparisons are made, highly unfavorable to the courts, of the speed and efficiency with which the numberless administrative tribunals go about their business. "cutting through red tape," abolishing "technical rules of evidence" and bringing issues to a quick and final determination. Lawyers generally are quick to admit all this and say, "we must have more speed and efficiency in our courts"—and they suggest a general overhauling and streamlining of the courts and their procedures, in order to have our courts compete with the bureaus.

I say it's time for lawyers to stop apologizing for our courts. If lawyers stopped and thought before they spoke or wrote in apology or criticism of the courts, and asked themselves the questions: "What are the functions and objectives of our courts?" and: "What are the functions and objectives of administrative tribunals?" the days of apologies and deprecations would be over. Therefore, lawyers owe it to themselves to return to a few fundamentals, before apologizing.

The fundamental proposition is: What are the functions and objectives of our courts? There is really but one, and that is to administer justice, judicially. On the other hand, this is not the function or objective of any administrative tribunal. A moment's reflection will demonstrate this. Every administrative tribunal is the agency of either the legislative or executive branch of our government, federal or state. As such, its function and objective is the enforcement of specific legislation, or the promulgation of regulations and their enforcement. While human rights and property rights are always involved in its deliberations, justice as such is not its concern, but, rather the furtherance of executive or legislative policy. To insure the carrying out of such policy, control of such agency must be had. This is accomplished by making hearing officers or boards employees of, and subject to, such agency, so that assurance can be had that the policy laid down will be carried out.

Since the hearing officers or boards are employees of such

bureau, it cannot be expected that impartiality, or independence of judgment will be exercised. Whatever policy is laid down will be followed, since a good employee does not disobey his employer, and bad employees are quickly gotten rid of. The expectation of this quick response to policy is well illustrated in the famous Harry Bridges Case. Deportation proceedings were instituted against him by the Department of Immigration & Naturalization. The first hearing before the examiner resulted in a recommendation that he not be deported. Subsequently another hearing was held on the same matter before another examiner. This hearing officer recommended that he be deported. Bridges appealed to the appeal board of the Immigration Department, and to the consternation of that department, this board disapproved the hearing officer's recommendations; but because it was determined that Bridges be deported the appeal board was by-passed and the proceedings reinstituted.

No one fully cognizant of the facts will expect justice to be administrated by the administrative tribunals. To administer justice, there must be the power to judge. To have this power the judge must be free — free incidentally to judge wrongly — to ignore policy, expediency, even public opinion; and this freedom cannot be found where the employee-employer relation exists.

Nor do we need expect that undue consideration will be given to such things as weight of evidence, burden of proof, presumptions of innocence, principles of equity, etc. The bureaus have no concern with these matters. Indeed they are alien to their spirit. Due process, in its full meaning, is a concept handed down through centuries of strife to achieve justice through courts and is a concept unique and peculiar to our English judicial heritage. Other traditions knew nothing of these things. The exercise of judicial functions by bureaus springs from the continental European traditions in which the judiciary is an arm of the executive power, operating under a ministry of justice and responsible to the executive. Under this tradition, the courts are as much a part of the policy-making machinery of the executive as any other department. This is undoubtedly why lawyers, and parties themselves, have a feeling of uncertainty and futility when appearing before these agencies. They are in a foreign atmosphere. They are conscious that considerations other than the facts before such agency will motivate its decision.

The charge is sometimes made that lawyers can do no good for their clients before administrative tribunals, and it has been the practice of some bureaus to advise parties appearing before them that they do not need the services of a lawyer. This charge is only partly true; but it is the fact that lawyers on the whole do not do their best work in the bureaus. I believe this is because lawyers are schooled for the courts where they know they can freely assert their clients' rights and where they feel confident their clients do have rights; whereas before the agencies they are not sure of these things. For example, the State Department of Agriculture is empowered to fix the prices of fluid milk and is required to hold public hearings concerning such prices before establishing them. It is the practice of this department prior to such hearing, to make surveys of costs and based upon such surveys and othed data collected, to prepare a proposed order fixing fluid milk prices. At the hearing, interested parties, if they are not in accord with such prices and seek changes therein, are placed in the position where they must convince the hearing board (upon which sit the experts who made up the proposed order) that the prices it has already determined are not fair. In other words, they must overcome the conviction of a board whose collective mind is already made up. Lawyers, and even citizens generally, are not accustomed to exerting this type of persuasion, and so they feel out of place and uncertain with these methods and procedures.

It cannot be disputed, however, that this type of procedure is efficient, cuts through red tape, abolishes traditional rules of evidence and insures certainty of results. But so does lynch law. So does a drum-head court martial. And no one can dispute the despatch and efficiency with which the Nazi courts fulfill their functions. But Americans recoil from this kind of efficiency, resulting, as it necessarily must, from the disregard of our tradition of a free and independent judiciary, having safeguards thrown around its procedures for the protection and preservation of rights of the people regardless of time consumed or results obtained. Freedom is a pearl of great price. If we want free courts we must pay a great price for them as our ancestors did.

I have said that for a judge to truly judge he must be free. This is true. He must also be willing, in the exercise of that

freedom, to become a part of, and subject himself to, the traditions, customs and laws which bind the judiciary. To do this he must not prejudge, he must hear evidence, competent evidence. He must be blind, like justice itself, to the respective power and position of the parties before him. If a court makes the government prove the guilt of an accused, it is undeniably lengthening the time of the trial. If it forces the government to confront the accused with the witnesses who accuse him, and oblige those witnesses to testify to facts, not hearsay or conclusions, and to submit to the testing ground of cross-examination, rules of evidence will come into play. If the judgment of a court is to be scrutinized by a higher court, to insure that justice has been done, delay will follow.

In short, our courts cannot cempete with the bureaus. We must not expect them to. Nor should we apologize for them or their shortcomings. Rather, we must abandon the defense and take up the offensive and fight for the preservation and restoration of the courts to their legitimate position as the judicial department of our government. Because, finally analyzed, this controversy of courts versus bureaus is the fight between democracy and totalitarianism.

PROFESSIONAL ETHICS

OPINION NO. 149

(May 10, 1944)

EXPENSES OF LITIGATION. An attorney may not with propriety agree to pay expenses and costs of litigation.

COMMINGLING OF FUNDS. It is improper for an attorney to commingle the money or other property of a client with his own.

A member of the Association inquires as to how a firm of attorneys should treat a sum paid them by a client pursuant to a contingent fee contract, which the member describes as follows: (In the quotations below we have substituted fictitious sum for those set forth in the member's communication but the fictitious sums are relatively the same as the actual sums.)

> "A firm of lawyers is retained by a client to conduct important and extensive litigation, looking towards the recovery of a large amount of money. At the time of accepting the employment, the firm of lawyers prepares a

written contract, which contains among other provisions, the following:

> " 'The client will pay to the attorneys the sum of Fifteen Thousand Dollars ($15,000.00) and a contingent fee based on the amount of all sums or things of value recovered as a result of such suit (or suits) of 15% of the first $500,000.00 recovered and 10% of all sums in excess of $500,000.00, payable only when and as received by the client and in the same money or things of value as are received by the client. Of said $15,000.00 the attorneys have heretofore been paid $1,250.00, and the balance of $13,750.00 will be paid forthwith upon the execution of this agreement.
>
> " 'The said attorneys agree that in consideration thereof they will bear and pay all expenses and costs of such suit or suits, including all appeals, and hold the client harmless by reason thereof.'

"At the time the contract is executed, it is known that it will be necessary to expend for expenses and costs an amount which will constitute a very substantial portion of the initial payment of $15,000.00, and which might easily equal or exceed said sum of $15,000.00."

The specific question submitted to the Committee is this:

> "Under these circumstances, is the firm of lawyers under the obligation of setting aside the $15,000 as a trust fund, and treating that money as trust money, until the final conclusion of the work of the employment and the determination of the amounts necessary to be expended for expenses and costs?
>
> "You will observe that the contract does not specifically provide that the $15,000 shall be used for expenses and costs. Neither does it provide that the $15,000 is paid as a fee or compensation."

We think the Committee must decline to answer the submitted inquiry for these reasons:

First: If the contract means what it says, the attorneys, in consideration of their retention on a contingent fee basis and $15,000.00 in cash paid them by the client, have agreed to bear and pay all costs and expenses incident to the litigation. In the opinion of the Committee such an agreement is obnoxious to Canon 42 of the American Bar Association's Canons of Professional Ethics, which reads:

> "A lawyer may not properly agree with a client that the

> lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

The Committee deems it idle for it to undertake to determine, in light of the principles of professional ethics, how the attorneys should treat money paid them for their promise to do what Canon 42 forbids.

Second: Rule 9 of the Rules of Professional Conduct of the State Bar provides that "a member of the State Bar shall not commingle the money or other property of a client with his own. . . ." The principle declared in this rule might be applicable to the sum paid to the attorneys if the contract can, or should, be construed as providing in effect that the money was entrusted to the attorneys as the primary source for the payment of costs, and hence that the client retained a beneficial interest therein. Whether the contract can, or should, be so construed is a question of law. It is not the province of this Committee to answer questions of law.

This opinion, like all opinions of this Committee, is advisory only. (By-laws, Art. VIII, Sec. 3.)

COMMITTEE ON LEGAL ETHICS
By WM. T. COFFIN, *Chairman.*

OPINION NO. 150

(May 10, 1944)

ADVERTISING AND SOLICITATION—ANNOUNCEMENT OF OPENING LAW OFFICE. It is professionally improper for an attorney to publish an announcement in a trade journal that he has resigned from the employ of a member of the industry and has established an office for the practice of law.

An attorney proposes to publish in a motion picture trade journal an announcement in the following form:

> "I am today announcing my resignation from 'A. & B. Studios' and the opening of offices for the practice of law. I wish to take this opportunity of expressing my appreciation and thanks to the Executives and Employees of 'A. & B. Studios' who have made this association one of great satisfaction and pleasure.
>
> "JOHN DOE,
> "'C' Building
> "Tr. 0000.

The attorney submits the following questions:

"1. Would the foregoing announcement be objectionable from an ethical point of view?

"2. If the foregoing is objectionable, would the same announcement without address and phone number be permitted?

"3. If #2 (and not #1) is permitted, could there also be a separate announcement re opening of offices with phone and address?

"4. Would a simple announcement of resignation and opening of offices without the expression of appreciation be acceptable assuming that the foregoing is objectionable?

"5. Is it permitted to state in the announcements of the opening of offices that my New York correspondents are 'X and Y' who are attorneys admitted to practice in New York, but not in California?"

We think the first of the submitted questions must be answered in the affirmative and each of the remaining questions in the negative. Members of the State Bar are prohibited from soliciting

professional employment by advertisement or otherwise. (Rule 2 of the Rules of Professional Conduct of the State Bar; *Libarian v. The State Bar,* 21 Cal. (2d) 862). The applicable canon of American Bar Association Canons of Professional Ethics is 27, the material portion of which reads:

> "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment, such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct the magnitude of the interest involved, the importance of the lawyer's position and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper."

The rule against direct or indirect solicitation of professional employment admits of but three exceptions:

First: The customary use of a simple professional card is permissible, but not the publication thereof in newspapers or other periodicals. (Rule 2 and Canon 27, *supra*).

Second: An attorney engaged in a specialized legal service directly and only to other lawyers may insert a dignified notice of that fact in legal periodicals where it will afford information to lawyers desiring to obtain such service. (Canon 46).

Third: Cards announcing the opening or removal of law offices, the formation of partnerships, changes in firm personnel and the like may be circulated in the usual and customary manner by mail or personal delivery but may not be published in newspapers or other periodicals; repetition of such circulation is not permissible except when further changes of offices or personnel occur. (Rule 3, Rules of Professional Conduct, *supra.*)

The proposed announcement manifestly does not fall within any of the three exceptions, whether or not there be deleted from the announcement the expression of appreciation and the address and telephone number of the attorney. (See Opinions 78, 104, 111, 127, 128 and 147 of this Committee, and Opinions 42, 145

and 185 of American Bar Association Committee on Professional Ethics and Grievances.)

This opinion, like all opinions of this Committee, is advisory only. (By-laws, Art. VIII, Sec. 3.)

COMMITTEE ON LEGAL ETHICS
By WM. T. COFFIN, *Chairman.*

LAWYERS IN MOTION PICTURES

SEVERAL years ago, the Los Angeles Bar Association interested itself in the manner in which lawyers were being portrayed in motion pictures. At that time a Bar committee interviewed certain picture production officials regarding specific cases in which lawyer characters were presented as engaged in unethical activities. Since that time there has been a notable change in the portrayal of all the professions in motion pictures. This is apparent from a summary of pictures approved in 1943 by the Production Code Administration which was printed in the American Bar Association Journal for February, 1944, as follows:

The Motion Picture Producers and Distributors of America, Inc., has prepared a breakdown of analysis sheets for all pictures approved during the year 1943 by the Production Code Administration, whose specific task is to administer the Motion Picture Production Code which sets high standards of wholesomeness and good taste in films. Among the Annotations to the Code, prepared in 1937-38 (25 A.B.A.J. 191), was the following provision referring to "Professions":

"All professions should be presented fairly in motion pictures."

The breakdown giving statistics for the 417 feature length pictures reviewed by the Production Code Administration during 1943 discloses that lawyers appeared in 68. Due to the fact that more than one lawyer appeared in some stories, there were 85 characterizations of lawyers in pictures. Reviewers of the Production Code Administration classify all characterizations under the headings—"sympathetic," "unsympathetic," or the merely background characterizations touched upon so slightly as to be called "indifferent."

A breakdown of the 85 characterizations of lawyers shows: 13 were sympathetic or heroic leads, including one district at-

(Continued on page 312)

JOINT TENANCY AND COMMUNITY PROPERTY

A FEW COMMENTS

By Richard H. Forster of the Los Angeles Bar

SINCE the passage of the 1942 Revenue Act, the termination of joint tenancies in community property states has acquired added importance, in estate planning, as a tax-saving measure. In California by far the greatest amount of real property, especially residential, held by husbands and wives, stands in their names as joint tenants, the reason being that real estate men, escrow clerks and attorneys for many years have been advising husbands and wives to take title to real estate as joint tenants in order to save the time and expense of probate. The result is that in the estate of almost any married man who has not had sound counsel on estate planning, there stands some joint tenancy property. There are many cases of substantial estates in which all of the property is held in joint tenancy by the husband and wife. So long as the total estate taxable on the death of the husband or wife, including life insurance, does not exceed $60,000, there are many good reasons why all property of a happily married couple should be held by them as joint tenants. When the net taxable estate exceeds $60,000 the point is soon reached at which it becomes very inadvisable to hold any property as joint tenants.

Since the amendments to the 1942 Revenue Act, many problems relating to taxation of community property have arisen under both the estate and gift tax provisions. One of these problems is whether or not joint tenancy property having its original source in new community property, earned by the husband, is taxable 100% on the death of the husband. Another is whether or not the termination of such a joint tenancy constitutes a taxable gift. A third involves the question as to whether or not such termination in contemplation of death can be set aside for estate tax purposes.

If a husband dies holding title to real or personal property in joint tenancy with his wife, such property having had its original source in the separate property of the husband or in community property acquired by the parties prior to July 29, 1927, the entire property is taxable in his estate under the federal estate tax laws.

This is so by reason of the provisions of sec. 811(e) (1) of the Internal Revenue Code which provides:

> "(1) JOINT INTERESTS.—[Are taxable]—To the extent of the interest therein held as joint tenants by the decedent and other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person; *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse,

> then to the extent of one-half of the value thereof, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants."

This section has been in effect for many years and is not affected by the 1942 amendments. However, without any change in the above quoted subdivision (1), there was added by the 1942 Revenue Act subdivision (2) of 811(e) which provides as follows:

> "(2) COMMUNITY INTERESTS.—[Are taxable]—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

Now the question is, on the death of a husband holding title to real property in joint tenancy with his wife, which property had its original source in community property acquired since July 29, 1927, as a result of the husband's earnings, is the entire joint tenancy estate includable in the husband's taxable estate? The Commissioner takes the position that it is. The regulations under this section provide as follows (Reg. 105, sec. 81.22):

> "For the purpose of determining the taxable portion to be included in accordance with the above rules in the gross estate of a decedent who died after October 21, 1942, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse. Thus, if in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse was transferred to themselves as joint

tenants or tenants by the entirety, the entire value of such property at the time of decedent's death is includable in his gross estate, with the exception stated in the preceding sentence."

Prior to the addition of subdivision (2) of section 811(e), it was well established that in such a situation only one-half of the estate was taxable, provided satisfactory evidence could be produced proving the contribution to the joint tenancy of new community property. It is difficult to see how the addition of this subdivision (2), relating to an entirely different incident of taxation, can change the meaning of subdivision (1). Property held in joint tenancy by a husband and wife in California is one-half the separate property of each, in the absence of an agreement to the contrary. The only section relating to the taxation of such property on the death of one of the joint tenants is subdivision (1) of section 811(e). Subdivision (2) clearly relates only to the taxation at death of property held by a husband and wife as community property. It does not, and in fact could not, change the character or nature of the ownership of community property. The Commissioner's regulation states that the decedent "is considered as the original owner of all of the community property so transferred" into joint tenancy. Such an interpretation is clearly contrary to the laws of the community property states. The fact remains that the husband in the above case was never the "owner" of the community property. There have been numerous criticisms made of the amendments to the estate and gift tax acts relating to community property and there will soon be judicial interpretations of the constitutionality of the sections, but in the instant case in addition to the questions as to the constitutionaliy of the sections themselves there would seem to be good grounds for attacking the Commissioner's conclusions as to their applicability.

However, the estate planner cannot afford to gamble his client's money on the possibility of Congressional acts or Commissioner's regulations being held unconstitutional, especially where there is an easy remedy, as there is in this case. Furthermore, even if the application of the community property amendments to this set of facts is improper, there remains in every joint tenancy situation an extremely difficult burden of proof as to contribution or source on the part of the survivor.

The obvious answer to the above problems is to terminate the

joint tenancy and make the owners tenants in common. With some exceptions discussed below, if the joint tenancy had its source in the separate property of either party, a gift was made as to one-half when the joint tenancy was created, regardless of whether a gift tax was in effect at the time. If the joint tenancy had its source in community property acquired by the parties prior to July 29, 1927, a gift was made by the husband to the wife of one-half upon the creation of the joint tenancy. If the joint tenancy was created prior to January 1, 1943, the effective date of the gift tax amendments under the 1942 Revenue Act, out of community property acquired as the husband's earnings after July 29, 1927, no gift resulted on the creation since the wife already had a vested interest in one-half of the property. By the terms of the 1942 Revenue Act, subdivision (d) was added to section 1000 and provides as follows:

> "(d) COMMUNITY PROPERTY.—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife."

The Commissioner has issued regulations to the effect that the creation of joint tenancy after January 1, 1943, out of community property representing earnings of the husband results in a gift by the husband to the wife of one-half of the value of the property. Thousands of escrows are closing every day in California vesting title in joint tenancy of husband and wife. Practically all of them involving transfers of community property of a value of more than $6000 should be reported for federal gift tax purposes. It is extremely doubtful if many of them will be reported.

Suppose a gift tax is properly paid on such a transfer into joint tenancy of property representing earnings of the husband, will there be an estate tax to pay on the death of the husband measured by 100% of the value of the property? This is the same situation as the one in which a gift tax has been properly paid on a transfer of the separate property of the husband into new community property followed by the death of the husband.

It is assumed that in both cases an estate tax based on 100% of the value will be assessed and credit will be given, under the appropriate sections, for the gift tax which has been paid.

In any event, upon the termination of a joint tenancy of real property and conversion into a tenancy in common there is no gift tax and large estate tax savings often result. For instance, if a man has a net taxable estate of $400,000, of which his home, worth $20,000, is in joint tenancy with his wife, by putting the home in tenancy in common with his wife about 40% of $10,000 will be saved. The only additional expense will be the costs and fees incident to probating $10,000 worth of real estate. If the entire estate were real property in joint tenancy, the estate tax on the death of the husband would be approximately $87,750. By converting the joint tenancy into tenancy in common the estate tax on the death of the husband would be approximately $31,500, a saving of $56,200. The cost of probate of the $200,000 estate would be negligible compared with the tax savings accomplished.

One further question arises in connection with the termination

of a joint tenancy of real estate. If the termination is made in contemplation of death, can it be set aside for estate tax purposes and the parties considered to be joint tenants? The Internal Revenue Code, sec. 811(c), provides that there shall be included in the gross estate all property "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intention to take effect at or after his death. . . ." Ordinarily this section has only been applied to a situation where there has actually been a gift within the meaning of the gift tax sections. Since a termination of a joint tenancy and conversion into tenancy in common is not a gift, inasmuch as each of the parties still has a one-half undivided interest in the whole, it would seem that such a termination could not be set aside even if made in contemplation of death. Assume this situation. A husband and wife acquired a piece of property in California for $3000 in 1913. It was put in their names as joint tenants. In March, 1943, the husband became critically ill and was unconscious. The property had increased in value through discovery of oil and was worth $600,000. If the husband died, there would be an estate tax of approximately $145,700. Since one of two joint tenants can at any time convert a joint tenancy into a tenancy in common, the wife terminated the joint tenancy by conveying her half to a third party who immediately reconveyed to her. On the husband's death the estate tax amounted to $59,100, a saving of $86,600. No gift tax resulted from the wife's conveyance out and the third party's reconveyance since there was no intent to make a gift. Also no capital gain was realized since no actual sale took place. Can it be argued here that the joint tenancy was terminated in contemplation of death, resulting in the termination being set aside for estate tax purposes? It would seem not. The decedent certainly did not make a transfer in contemplation of death. He had nothing to do with it.

It is often more advisable from an estate planning standpoint to divide real property held in joint tenancy between the spouses so that each one owns as his and her separate property the entire title to specific pieces. In other words, if a husband and wife hold $400,000 worth of real property in joint tenancy, by proper conveyances they can put half of the property in the

name of the husband as his separate property and half of it in the name of the wife as her separate property. If the husband and wife desire to create testamentary trusts for the purpose of avoiding duplication of taxes and probate expense on the death of the survivor, it is certainly more advisable to divide the property in this way. The Trustee is then not left holding one-half undivided interest in numerous pieces of property. It is difficult to see how such a division and transfer could be set aside for estate tax purposes as having been made in contemplation of death.

In the case of bank accounts and government bonds issued in the names of "husband or wife," there is no gift tax upon the creation of the joint tenancy.[1] The reason for this is that the "donor," or creator of the joint tenancy, does not relinquish the right to revoke the gift. He can withdraw the entire bank balance or cash in the bond. A gift does result as to the amount withdrawn if the "donee" makes a withdrawal or cashes in the bond. Reg. 108, sec. 86.2(a) (4). The same reasoning would seem to apply to a deposit of tangibles, bearer bonds, or other negotiable instruments in a joint safety deposit box. In California it is presumed that such property is held in joint tenancy by the owners of the box. This means that a gift tax liability will often result on the termination of a joint tenancy of United States bonds or bank accounts in the names of "husband or wife" or the termination of a joint tenancy covering the negotiable contents of a safety deposit box. This still might be appreciably less than the estate taxes which would result if the joint tenancies were not terminated.

It is interesting to note that the Commissioner's Regulations, Reg. 108, sec. 86.2(c), provide: "No gift tax results from a transfer on or after January 1, 1943, of separate property of either spouse into community property." This means that a man with a large separate estate can immediately convert it into "new" community property without gift tax and thereafter report the income from it as half income to himself and half to his wife. If such a transfer is made, what will be the result if the

---

[1]Government bonds held in the names of "husband or wife" are not joint tenancy property, but, under the provisions of California Civil Code, sec. 704, adopted in 1943, bonds so held are taxable on death of one of the co-owners in the same manner as is joint tenancy property.

gift and estate tax amendments under the 1942 Revenue Act are subsequently held unconstitutional?

It is unfortunate that the United States Supreme Court refused to take jurisdiction of the case of *Flournoy v. Wiener*, 64 Sup. Ct. 548, 88 L.Ed. (Adv. Ops.) 478 (Feb. 28, 1944).[2] A decision on the merits in this case would have settled many of our present tax difficulties concerning community property. As the matter now stands, it will probably be many months, if not years, before satisfactory conclusions can be reached on the many constitutional and interpretative questions involved.

[2]See Nossaman, Comments on *Flournoy v. Wiener*, 19 LOS ANGELES BAR BULLETIN, 255 (Apr., 1944).

LAWYERS IN MOTION PICTURES

(Continued from Page 303)

torney; 12 prominent sympathetic characterizations, including four district attorneys; 17 lawyer characterizations termed "indifferent" (background characterizations); 43 minor lawyer roles, sufficiently important to be divided into 29 "sympathetic," and 14 "unsympathetic." Of the 14 "unsympathetic" characterizations, seven of these were in "Western type" stories laid 75 or more years ago. As to the remaining seven "unsympathetic" characterizations, in three of these stories "sympathetic" lawyers were shown also. It should be noted that the mere designation of a lawyer as "unsympathetic" does not imply that he is shown as unethical but that he is shown opposed to the interests of the leading characters who enjoy the "sympathy" of the audience.

Of the 85 characterizations, 76 were played "straight" (seriously) while nine were played for "comedy," but in all the latter classification, these were also played "sympathetically."

Judges appeared in 54 feature pictures, in three of which they had leading sympathetic roles. Of 54 judges, 45 were played "sympathetically," one "unsympathetically," and eight were so minor as to be marked "indifferent." Fifty-two judges were played "straight" or seriously, two were placed humorously, both of the latter in "Western type" pictures.

There were no pictures of contemporary American life suggesting any miscarriage of justice or unethical conduct on the part of the judiciary.

ETIN

t are

Court
ener,
44).[2]
many
erty.
ns, if
n the

GELES

uding
"in-
roles,
nd 14
tions,
more
cteri-
were
of a
vn as
f the
ience.
(seri-
latter

n they
layed
re so
were
ously,

sug-
n the

LT. EMMET H. WILSON, JR. U.S.N.R.
2220 N. EDGEMONT
LOS ANGELES 27, CALIF.

U. S. POSTAGE
1c PAID
Los Angeles, Calif
Permit No. 1067

VOL


STAGE
AID
es, Calif
o. 1067